

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of BRENDA L. WOODS and U.S. POSTAL SERVICE,
POST OFFICE, Memphis, Tenn.

*Docket No. 96-2518; Submitted on the Record;
Issued October 1, 1998*

DECISION and ORDER

Before MICHAEL J. WALSH, WILLIE T.C. THOMAS,
MICHAEL E. GROOM

The issue is whether the Office of Workers' Compensation Programs properly refused to reopen appellant's claim for merit review on the grounds that her request for reconsideration was untimely and failed to show clear evidence of error.

In the present case, the Office accepted that appellant sustained a generalized anxiety disorder with depressive features in the performance of duty. By decision dated April 17, 1992, the Office terminated appellant's compensation on the grounds that she had refused an offer of suitable work. Appellant requested reconsideration and by decision dated March 25, 1993, the Office denied modification of its prior decision. The Office received a second request for reconsideration and by decision dated June 4, 1993, the Office denied the request without reviewing the merits of the claim.

In a letter dated July 1, 1995, appellant again requested reconsideration. She submitted a January 26, 1995 report from Dr. L.D. Hutt, a clinical psychologist, a March 16, 1992 memorandum from the employing establishment that had previously been submitted and portions of a document that was apparently prepared in connection with a civil action against the employing establishment.

By decision dated January 12, 1996, the Office found that appellant's request was untimely and failed to show error in the prior decisions.

The Board's jurisdiction is limited to final decisions of the Office issued within one year of the filing of the appeal.¹ Since appellant filed her appeal on August 14, 1996, the only decision over which the Board has jurisdiction on this appeal is the January 12, 1996 decision denying her request for reconsideration.

¹ 20 C.F.R. § 501.3(d).

Section 8128(a) of the Federal Employees' Compensation Act² does not entitle a claimant to a review of an Office decision as a matter of right.³ This section vests the Office with discretionary authority to determine whether it will review an award for or against compensation.⁴ The Office, through regulations, has imposed limitations on the exercise of its discretionary authority under 5 U.S.C. § 8128(a).⁵ As one such limitation, the Office has stated that it will not review a decision denying or terminating a benefit unless the application for review is filed within one year of the date of that decision.⁶ The Board has found that the imposition of this one-year limitation does not constitute an abuse of the discretionary authority granted the Office under 5 U.S.C. § 8128(a).⁷

In the present case, appellant submitted a letter dated July 1, 1995, requesting reconsideration of her claim. The last decision on the merits of her claim was dated March 25, 1993; since appellant's request is more than one year after this decision, it is considered untimely.

The Board has held, however, that a claimant has a right under 5 U.S.C. § 8128(a) to secure review of an Office decision upon presentation of new evidence that the decision was erroneous.⁸ In accordance with this holding the Office has stated in its procedure manual that it will reopen a claimant's case for merit review, notwithstanding the one-year filing limitation set forth in 20 C.F.R. § 10.138(b)(2), if the claimant's application for review shows "clear evidence of error" on the part of the Office.⁹

To establish clear evidence of error, a claimant must submit evidence relevant to the issue, which was decided by the Office.¹⁰ The evidence must be positive, precise and explicit and must be manifest on its face that the Office committed an error.¹¹ Evidence which does not raise a substantial question concerning the correctness of the Office's decision is insufficient to

² 5 U.S.C. § 8128(a).

³ *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

⁴ Under section 8128 of the Act, "[t]he Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application."

⁵ Thus, although it is a matter of discretion on the part of the Office whether to review an award for or against payment of compensation, the Office has stated that a claimant may obtain review of the merits of a claim by: (1) showing that the Office erroneously applied or interpreted a point of law; or (2) advancing a point of law or a fact not previously considered by the Office; or (3) submitting relevant and pertinent evidence not previously considered by the Office; *see* 20 C.F.R. § 10.138(b)(1).

⁶ 20 C.F.R. § 10.138(b)(2).

⁷ *See Leon D. Faidley, Jr.*, *supra* note 3.

⁸ *Leonard E. Redway*, 28 ECAB 242 (1977).

⁹ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(c) (May 1996).

¹⁰ *See Dean D. Beets*, 43 ECAB 1153 (1992).

¹¹ *See Leona N. Travis*, 43 ECAB 227 (1991).

establish clear evidence of error.¹² It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.¹³ This entails a limited review by the Office of how the evidence submitted with the reconsideration request bears on the evidence previously of record and whether the new evidence demonstrates clear error on the part of the Office.¹⁴ To show clear evidence of error, the evidence submitted must not only be of sufficient probative value to create a conflict in medical opinion or establish a clear procedural error, but must be of sufficient probative value to *prima facie* shift the weight of the evidence in favor of the claimant and raise a substantial question as to the correctness of the Office decision.¹⁵ The Board makes an independent determination of whether a claimant has submitted clear evidence of error on the part of the Office such that the Office abused its discretion in denying merit review in the face of such evidence.¹⁶

The evidence submitted with the July 1, 1995 request for reconsideration is not sufficient to establish clear evidence of error. In a January 26, 1995 report, Dr. Hutt stated that his approval of the offered position was based on the assumption that appellant would be working as an employee of the Army Corps of Engineers. He asserted that he would not have approved a position as an employing establishment employee, without providing further explanation.

The Board notes that Dr. Hutt had indicated on February 27, 1992, that appellant was medically capable of performing the position of support assistant. The job offer indicates that the offered job was at the Army Corps of Engineers, based upon medical restrictions that precluded appellant from working at the employing establishment. With her request for reconsideration, appellant resubmitted a March 16, 1992 memorandum from the employing establishment, which explains that appellant would be working at the Corps of Engineers under a supervisor of the Corps, but would administratively remain an employee of the employing establishment.

Dr. Hutt stated in his January 26, 1995 report, that if he had been aware that appellant would still be considered an employee of the employing establishment, he would not have approved the offered position on February 27, 1992. The Board notes that the job offer originally reviewed by Dr. Hutt described the position offered and correctly indicated that the work would be performed at the Corps of Engineers. Dr. Hutt does not clearly explain why his medical opinion would have changed based on an administrative matter regarding appellant's employment. The Board finds that the January 26, 1995 report is not sufficient to establish clear evidence of error in this case.

The remaining evidence submitted, excerpts from legal arguments offered in a civil action, do not provide probative evidence on the relevant issues under the Act and do not

¹² See *Jesus D. Sanchez*, 41 ECAB 964 (1990).

¹³ See *Leona N. Travis*, *supra* note 11.

¹⁴ See *Nelson T. Thompson*, 43 ECAB 919 (1992).

¹⁵ *Leon D. Faidley, Jr.*, *supra* note 3.

¹⁶ *Gregory Griffin*, 41 ECAB 458 (1990).

establish clear evidence of error in this case. The Board accordingly finds that the Office properly denied appellant's untimely request for reconsideration.

The decision of the Office of Workers' Compensation Programs dated January 12, 1996 is affirmed.

Dated, Washington, D.C.
October 1, 1998

Michael J. Walsh
Chairman

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member